

BDCP NEPA/CWA Section 404 Integration Issues
April 4, 2011

The following is intended to address the extent to which there will be a need for further NEPA review by the Corps in connection with its permitting actions related to implementation of the BDCP. Two questions have been posed:

1. Since the BDCP EIR/EIS is project specific for the conveyance and water operations, will the Corps have to conduct further review for those actions?
2. What is the relation between the EIS Purpose and Need Statement and the 404 Purpose Statement, and which actions does each apply to?

Question #1 – Reclamation’s short answer to this is no. The analysis provided in the BDCP EIR/EIS will be conducted on a project-specific level of detail for all actions related to construction and operation of the proposed conveyance facilities (i.e., the North Delta intakes, pipelines, tunnels, canals, forebays, etc.). The EIR/EIS currently under preparation is intended to provide all the needed detailed analyses to support the Corps permitting processes for the facilities. The following information will be included in the EIR/EIS to support Corps permitting needs:

- Alternatives Analysis - As required by NEPA, the alternatives included for detailed analysis described in Chapter 3 of the EIR/EIS will be evaluated at an equal level of detail. This chapter will also include a summary of the alternatives that were evaluated, but were not carried forward for detailed analysis. The screening criteria process and documentation of the conclusions of the alternatives screening process will also be included in Chapter 3. An Alternatives Development appendix will provide detailed background information for each alternative considered as part of the process.
- Wetlands Analysis - A preliminary waters/wetlands analysis will be included in the technical appendices and a summary incorporated into Chapter 12 (Terrestrial Biological Resources). An overview of the function and services will be provided. General information on jurisdictional boundaries will be provided subject to property access restrictions. This information will be used to support the recommendation for the Least Environmentally Damaging Practicable Alternative (LEDPA).
- Mitigation - Mitigation for footprint of disturbance will be defined at a site-specific level in the EIR/EIS. This will include performance standards to replace the functions and services associated with the unavoidable loss of waters or wetlands. Chapters 11 (Fisheries) and 12 (Terrestrial) will identify any mitigation measures required above and beyond the conservation measures included in the BDCP. Conservation measures are intended to avoid and minimize impacts associated with the covered activities as well as contribute to recovery of covered species.

The BDCP also includes habitat restoration elements in its conservation strategy; however, these elements of the conservation plan are less advanced in the planning process than the conveyance and operations elements. Therefore, analysis of these actions will be at a programmatic level of detail in the EIR/EIS. The EIS/EIR will analyze the anticipated potential impacts of habitat restoration to the extent possible given the current level of planning, and will have to make firm commitments that site-specific restoration projects will have their own supplemental environmental compliance documentation

(including NEPA and 404(b)(1) analyses) as needed for project impacts beyond what is analyzed and disclosed in the BDCP EIR/EIS.

Question #2 – The BDCP Purpose and Need Statement included in the BDCP EIR/EIS addresses all elements of the proposed plan, including conveyance facilities, associated water operations, and habitat restoration activities. It has been prepared to support USFWS, NMFS, and DFG decisions on issuance of future ESA and NCCPA permits, therefore it broadly encompasses the whole of the BDCP program. In contrast, the purpose statement for the Corps permits will apply to those elements of the overall plan for which the Corps permit application is being submitted. As discussed and agreed to at a meeting with Reclamation, Corps, and EPA representatives in March 2010, the purpose statement associated with the CWA Section 404 permit application for construction and operation of the proposed conveyance facilities will be a subset of the more broad BDCP EIR/EIS Purpose and Need Statement. Similarly, the purpose statements for the subsequent environmental analyses for CWA Section 404 permit application for habitat restoration actions will be a subset of the BDCP EIR/EIS Purpose and Need Statement as appropriate for the specific project and permitting needs proposed at that time.

Corps regulatory staff has expressed their desire for separate analyses in the BDCP EIR/EIS related to the upcoming Corps permit actions because they need to consider the impacts of the portion of the program for which a permit is being applied for (most likely the new conveyance facilities and water operations). This would mean that the document would need to have essentially two sets of analysis for each category of impact; one which has just the actions proposed for the Corps permits and one for the entire BDCP program (which is proposed for the NCCPA/ESA permits). This proposal to split the EIR/EIS analyses is not feasible, as conveyance facilities and water operations actions alone (without habitat restoration) would most likely not be permitted by the regulatory agencies. Also, having two sets of analyses for each resource category in the EIR/EIS would make the document all the more unreadable and confusing to the public.

Corps staff has stated that 404 permits cannot be issued on actions that are at a programmatic level, therefore, the 404 permit would need to be issued for the conveyance and operations actions only. However, there are examples of programmatic 404 (b)(1) analyses (i.e., Everglades) and programmatic coordination with the Corps (i.e., High Speed Rail MOU), which contain broad level analysis appropriate to the level of planning, and commit to future site specific 404(b)(1) analysis as projects are further developed. While the Everglades example is a Corps 404(b)(1) analysis, and not an applicant driven analysis (no permit issued), perhaps the case could be made that a similar approach could be used for the BDCP, where the BDCP 404(b)(1) analysis is project-specific for conveyance elements and programmatic for habitat restoration, with the commitment that future 404(b)(1) analyses will be done as restoration projects are further developed by the action agencies, and the understanding that the permit would only be for the project-specific conveyance and operations at this time.